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No. 02-722

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENTS — GERLING COMPANIES — IN SUPPORT OF PETITIONERS

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STATEMENT PURSUANT TO RULE 29.6

The Rule 29.6 statement for each of the respondent Gerling Companies is set forth in their petition for a writ of certiorari (Docket No. 02-733) at page iii, and there are no amendments to those statements.

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REPLY BRIEF FOR THE GERLING COMPANIES

The Commissioner defends the HVIRA as "an insurance regulation that seeks disclosure of withheld insurance policy information from private companies doing business in California." Brief for Respondent (hereinafter, "Resp. Brf.") at 1. He reinvents the HVIRA as "a California regulation of California insurance companies." Resp. Brf. at 36. Although it exclusively seeks European insurance information, he goes so far as to suggest that the HVIRA "does not even require out-of-state insurers to gather and compile" the information demanded. *Id.*

On its face and as applied, the HVIRA has little, if anything, to do with the business of insurance in California. It does not regulate any in-state activity of any California insurers. In the case of the Gerling Companies, it does not even request information in the possession or control of California insurers. It is simply an attempt to use presently-licensed California companies to access millions of insurance policies issued in Europe, to Europeans, by European companies.

The HVIRA *only* requires action by European insurers. It *only* requires production of information concerning European insurance transactions. It *only* seeks information maintained in Europe and which is subject to the laws of European nations. In sum, it constitutes an attempt by California to investigate and regulate European companies and European transactions.

The HVIRA demands production of voluminous and detailed information regarding every single insurance policy in effect in Europe between 1920 and 1945. CAL. INS. CODE § 13804(a). California-licensed insurers are required to obtain this information from any "related company" that issued policies in Europe. "Related company" is broadly defined to include familial corporate relationships (*i.e.*, parents, subsidiaries or

affiliates), as well as non-familial corporate relationships, such as reinsurers and managing general agents. CAL INS. CODE § 13802(b). The HVIRA imposes the draconian penalty of mandatory license suspension for failure to comply without any regard to the California insurer's ability to obtain the information from such "related companies."

The HVIRA does not regulate California insurers or the business of insurance in California in any meaningful way. It requires no action on the part of California companies other than performance of the ministerial function of funneling insurance information from Europe to California. In the words of the Eleventh Circuit, the California companies are nothing more than "nominally regulated" parties. *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001). As the district court correctly observed, "the gist of the HVIRA is not about licensing insurance companies, but rather about forcing companies to report on insurance policies issued in Europe and using the threat of license suspension as an enforcement mechanism." App. at 133a.[1]

Unlike a true "licensing" or "fitness" statute, the HVIRA does not establish rules for conducting the business of insurance in California. In fact, the HVIRA only imposes obligations on companies that have already been licensed in the State. It imposes no obligations on companies who are simply applying for a California license (and whose "fitness" has yet to be established). The HVIRA does not serve as an entryway to the California market. Instead, it uses existing California licenses to effectively regulate insurers and transactions over which the State has no direct authority.

In his brief, the Commissioner tries to recast the HVIRA in ways never articulated by the California legislature. For instance,

1. References to "App." are to the documents appended to the brief submitted by the Gerling Companies in support of their petition for certiorari (No. 02-733).

he uses the terms "affiliate" (which includes companies with corporate familial relationships) and "related company" (as defined under the HVIRA) interchangeably, thereby suggesting that the HVIRA requires insurers to obtain information exclusively from their own corporate relatives. *See, e.g.*, Resp. Brf. at 38 (stating that HVIRA requires information solely from California insurers "or their affiliates.") In fact, the HVIRA's "related company" definition sweeps in broad categories of companies outside the "corporate family" of the California insurer.

The Commissioner also suggests that the HVIRA requires information merely where there is a "control" relationship between the California insurer and the European company in possession of the documents. *See, e.g.*, Resp. Brf. at 2. In fact, the HVIRA does not contain such a limitation; it also requires insurers to obtain information from companies over which they have no control. The district court has expressly determined that the Gerling Companies do not have control over the insurance records of their distant German corporate relatives. Nevertheless, the HVIRA *requires* the Commissioner to suspend the licenses of these California insurers notwithstanding their lack of possession or control over the information demanded.

Whether analyzed under due process or Commerce Clause principles, the HVIRA constitutes impermissible regulation of European companies and European insurance transactions. In addition, it interferes with the effective operation of U.S. foreign policy in violation of *Zschernig v. Miller*, 389 U.S. 429 (1968).

I. THE HVIRA VIOLATES THE DUE PROCESS CLAUSE

A. The HVIRA Exceeds California's Legislative Jurisdiction

Longstanding decisions of this Court clearly "stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-311 (1981).[2] As Petitioners have demonstrated, California has no identifiable contacts with the relevant parties or transactions which would authorize the exercise of its legislative jurisdiction in this context.

The Commissioner's primary defense of the statute is his claim that "the HVIRA regulates only insurance companies doing business in California" by requiring reporting of Holocaust-era policy information "written by them or their affiliates." Resp. Brf. at 38. This post-litigation justification conflicts sharply with the rationale that the Commissioner offered the California legislature prior to enactment: "[t]he Department [of Insurance] believes this bill will be of significant assistance to the Department in its endeavor to ensure full payment of claims to Holocaust survivors and their descendants." Reply App. at 5a.[3] The Commissioner's current argument also conflicts with the language of the HVIRA itself; a statute which demands production of information regarding

2. *See also* Brief for the Petitioners (American Insurance Association and American Re-Insurance Company) (No. 02-722) at 43-45.

3. References to "Reply App." are to the documents appended to the reply brief submitted by the Gerling Companies in support of their petition for certiorari (No. 02-733).

all insurance policies issued in Europe between 1920 and 1945. CAL. INS. CODE § 13804(a).[4]

Apparently unable or unwilling to defend the statute as enacted by the California legislature, the Commissioner offers the Court (as he did the Ninth Circuit) a distorted version of the record. For example, he claims that the issue of whether foreign law bars disclosure of the information demanded is disputed. Resp. Brf. at 22, n.10. In fact, the district court already concluded that the Gerling Companies do not have control over the information required by the HVIRA.[5] App. at 47a. Similarly, the German government has repeatedly concluded that compliance by German companies with the HVIRA would cause them to violate German laws and thereby become subject to

4. The record could not be more clear that the State of California views the HVIRA as a tool to effect the conduct of European insurers. *See, e.g.*, ER 1111 (Department of Insurance senior counsel stated that HVIRA "clearly goes beyond the California licensed company."); ER 1113-1115 (the Commissioner demanded that representatives of German companies with no U.S. presence be made available to discuss compliance with HVIRA); SER 901-908 (California Treasurer issued a written demand to a German affiliate of the Gerling Companies that it should comply with HVIRA to "eliminate" litigation).

5. The Commissioner argues that a company could avoid regulatory investigation simply by moving documents into the hands of off-shore affiliates. Resp. Brf. at 3-4. In fact, if the insurer has the ability to move documents overseas, that insurer must have possession or control over those documents. Here, the Gerling Companies have never had possession or control of the information sought under the HVIRA as they never issued policies in Europe during World War II. ER 643, 648, 653, 658, 663, 668. Likewise, his argument that states routinely obtain information from foreign companies is misleading and disingenuous. Resp. Brf. at 2-3. In support, the Commissioner cites to CAL. INS. CODE §§ 1215.2(d)(5), 1215.4(g) and 1215.6. Every single one of these statutes presupposes an element of control between the regulated and foreign company or is applicable where the foreign company is conducting business directly in California. The same applies to the additional statutes cited by the Ninth Circuit. App. at 23a, n.10.

civil and criminal penalties. Brief for the Federal Republic of Germany as *Amicus Curiae* in Support of Petitioners (dated Feb. 24, 2003) ("Feb. 24, 2003 *Amicus* brf. of FRG") at 14.[6]

To support his new characterization of the HVIRA, the Commissioner takes extraordinary liberties in providing the Court with a revisionist history of the origins and purpose of the statute (legislation which he aggressively supported). Specifically, the Commissioner seeks to distance the HVIRA from its companion statute which purports to empower California courts to entertain Holocaust-related litigation. CAL. CIV. PRO. CODE § 354.5. In fact, these provisions were included in the same legislation as the HVIRA. AB 600 (the "Knox Bill") Lodg., L-36-L-41.[7] According to the California legislature, "[t]he author introduced this bill in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims." Reply App. at 4a.

The Knox Bill (and the resulting HVIRA) has nothing to do with an insurance company's fitness to write insurance in California. The HVIRA had a single purpose from the start: the payment of European insurance claims pursuant to California-imposed standards.[8] It attempts to effect conduct far beyond the

6. *See also* ER 846; SER 1248; Mar. 15, 2002 *Amicus* brf. of FRG at 6; Aug. 5, 2002 *Amicus* brf. of FRG at 9-10; Dec. 12, 2002 *Amicus* brf. of FRG at 4.

7. References to "Lodg." are to the documents contained in the Lodging filed by the Gerling Companies in support of their petition for certiorari.

8. The California Senate Floor Analysis of the Knox Bill contains a nine paragraph summary of this legislation. Paragraph eight of this document affirmatively states that the bill "[w]ould authorize legal actions on Holocaust insurance claims arising out of insurance policies purchased or in effect in Europe before 1945." Reply App. at 4a.

borders of the State. As such, it constitutes impermissible extraterritorial legislation and exceeds California's legislative jurisdiction.

B. The Rationale Of The Eleventh Circuit In *Gallagher* Controls

The reasoning adopted by the Eleventh Circuit in *Gallagher* should be dispositive here as well. In *Gallagher*, the Eleventh Circuit addressed a materially identical Holocaust-related insurance reporting statute which Florida sought to enforce against the same Gerling Companies. The Eleventh Circuit held:

> . . . to the extent the [Florida] Act calls for the production of information by these Plaintiffs [the Gerling Companies] regarding Holocaust-era policies issued outside of Florida by German entities having only some corporate affiliation with them and no other contacts to Florida, it violates Due Process limits of legislative jurisdiction.

Gallagher, 267 F.3d at 1240. The Eleventh Circuit found that Florida's

> reporting provisions pertain to, and as a practical matter, unquestionably seek to regulate, a subject matter – the German affiliates' payment or non-payment of Holocaust-era claims – with no jurisdictionally- significant relationship to Florida.

Id. at 1238.

The Commissioner's current attempt to distinguish the *Gallagher* decision is simply unfounded. Contrary to the Commissioner's assertion, the Eleventh Circuit did not hold the Florida Act unconstitutional because it did not have a

"consumer protection purpose." Resp. Brf. at 47. The Eleventh Circuit found the Act unconstitutional because it was effectively trying to regulate the Gerling Companies' German affiliates. Like the Commissioner in the instant matter, the Florida Commissioner put forth a litigation-manufactured justification for the Act. The Eleventh Circuit rejected this argument in view of the plain language of the Act. In addition, the Eleventh Circuit specifically stated that it was dealing *solely* with the reporting provisions of the Florida statute. *Gallagher*, 267 F.3d at 1234. Thus, the statutory provisions reviewed by the Eleventh Circuit were virtually identical to those contained in the HVIRA.

California enacted the HVIRA for the same reasons the Florida Act was enacted i.e., to investigate and resolve European insurance claims. *See* CAL. INS. CODE §§ 13801(e)-(f); App. at 83a; Reply App. at 4a-5a. For the reasons articulated by the Eleventh Circuit, the HVIRA exceeds California's legislative jurisdiction.

C. California Lacks the Requisite Minimum Contacts With The Regulated Companies And Transactions

In his brief, the Commissioner argues that the HVIRA satisfies the "minimum contacts" test required by the Due Process Clause. Specifically, he claims that California can require California insurers to disclose information that is relevant to "state interests." Resp. Brf. at 39. The issue is not whether the Commissioner can compel insurers under his regulatory authority to provide information to the State. The issues are whether the Commissioner can compel *foreign* companies to provide information to him by threatening the licenses of California insurers and whether the State has a sufficient interest in those foreign companies' transactions.

He further argues that the answer to whether California has "minimum contacts" with the subject matter turns on whether

the State has a legitimate interest that justifies the statute. Resp. Brf. at 40-45. There is simply no legal basis for this assertion. The test for "minimum contacts" under a legislative jurisdiction analysis is akin to that used in personal jurisdiction case law. *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000). "There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction." *Id.*; *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 315 n.2 (1970) (Harlan, J., dissenting) (citing *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)); *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211 (11th Cir. 2000); *Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir. 1999) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).[9]

Finally, the Commissioner asserts that (1) the Petitioners' business presence; and (2) the residence of thousands of Holocaust victims in California provide California with a sufficient "nexus" to satisfy the Due Process Clause. Resp. Brf. at 48-50. There is no dispute regarding the State's ability to regulate the in-state conduct of companies jurisdictionally present in California. The fact is, however, that the HVIRA is really regulating European insurers and transactions. *See* discussion *supra* at 1-3. In addition, the justification that numerous Holocaust survivors reside in California is unavailing as this fact alone is insufficient to confer jurisdiction. A "post-occurrence change of residence" by an insurance claimant alone is not a "significant contact" adequate to support jurisdiction. *McLuney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 583 (8th Cir.), *aff'd*, 454 U.S. 1071 (1981); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936); *see also Order of United Commercial Travelers of*

9. Thus, the Commissioner's argument that minimum contacts analysis depends on "justifying interests" and not "motivating purposes" is irrelevant for purposes of legislative jurisdiction. Resp. Brf. at 44-45.

America v. Wolfe, 331 U.S. 586 (1947); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

II. THE HVIRA VIOLATES THE COMMERCE CLAUSE

The Commissioner asks this Court to accept the notion that there are absolutely no Commerce Clause limitations on a state's power as respects the business of insurance. Resp. Brf. at 31-33. In this regard, the Commissioner goes to great lengths to distinguish *Federal Trade Commission v. Travelers Health Ass'n.*, 362 U.S. 293 (1960). This Court, however, has unequivocally stated that, in enacting the McCarran-Ferguson Act, it was clear that Congress viewed "state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300; *see also* Brief of Gerling Companies in Support of Petitioners at 33-36.

Petitioners have never disputed California's ability to regulate insurance within the state. That indeed was the intent of the McCarran-Ferguson Act – to permit states to continue to regulate insurance after the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). *See* Brief of Gerling Companies in Support of Petitioners at 33-36. However, the McCarran-Ferguson Act does not insulate the HVIRA from Commerce Clause restrictions where that regulation applies to insurance transactions *beyond* the state's borders. The Commerce Clause "precludes application of a state statute to commerce that takes place wholly outside of the State's borders, irrespective of whether the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982); *Healy v. Beer Institute*, 491 U.S. 324, 336-37 (1989).

Pursuant to the principles enunciated by this Court in *Healy*, the HVIRA constitutes impermissible extraterritorial regulation.

First, it seeks information solely on transactions that occurred outside the State of California. *See Healy*, 491 U.S. at 336. The information sought by the HVIRA exclusively involves insurance transactions entered into in Europe between European parties under European law. In the case of the German affiliates of the Gerling Companies, the HVIRA is focused on companies wholly outside California's regulatory authority and jurisdiction.

Second, the "practical effect" of the HVIRA is to control conduct beyond California's borders. *Id.* It requires European insurers that are not subject to California's regulatory authority to take affirmative acts. The Commissioner tries to rehabilitate the HVIRA by claiming that the only effect of the statute is "informational." Resp. Brf. at 36. Seeking information, however, for the alleged purposes of making licensing decisions *is* regulation. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) ("rules which require regulated entities to disclose information" are "regulatory tools available to [the] Government"). Even the Ninth Circuit recognized that "[s]eeking information from insurers about their claims-paying record to be used in the licensing process, is a form of regulating the business of insurance." App. at 84a.

The Commissioner also suggests that the HVIRA does not violate the Commerce Clause because it does not directly impose obligations on out-of-state insurers. Resp. Brf. at 36. Instead, it obligates California insurers to disclose the records maintained by their European affiliates. According to the Commissioner, the California insurers could travel to Europe and gather this information themselves. Resp. Brf. at 36. The Commissioner makes this argument notwithstanding the district court's finding that, at least in the case of the Gerling Companies, the California insurers do not have control over these records. One wonders how the Commissioner (as the regulator of California insurance) would respond if foreign companies descended on California for the purpose of gathering and exporting the in-state insurance records of California insurers.

This Court has noted that "the Commerce Clause protects against the inconsistent legislation arising from the projection of one state's regulatory scheme into the jurisdiction of another." *Healy*, 491 U.S. at 336. The HVIRA represents precisely such an attempt to project a California regulatory scheme into other jurisdictions. The HVIRA creates irreconcilable conflicts with the legitimate regulatory regimes of other jurisdictions. In its simplest terms, it requires conduct by foreign companies which is expressly prohibited under the governing laws of their home countries.

This is, perhaps, most clearly demonstrated by its direct interference with European and domestic data protection and privacy laws. The German government has conclusively determined that disclosure of the information sought by the HVIRA would violate Germany's data protection laws. ER 1182, 3131. The Commissioner wrongly asserts that the issue of whether the HVIRA violates German data protection laws is "hotly disputed." Resp. Brf. at 22, n.10. The Commissioner's own experts have essentially *conceded* that the HVIRA would require German insurers to violate German data protection laws because the information provided will be placed on a public registry pursuant to Cal. Ins. Code § 13803. *See* ER 1918, ¶ 7 (suggesting that although the information sought by the HVIRA is to be included in a publicly available registry, "the Commissioner can and shall adopt regulations that expressly prohibit improper use . . ."). The Commissioner's other expert shares the same opinion: "German law requires that personal information be transferred only to foreign countries offering equivalent data protection." ER 1572. California does not offer any data protection as it intends to place the information on a public registry.

The wholesale disclosure of personal insurance information mandated by the HVIRA is incompatible with U.S. privacy laws as well. For example, the HVIRA conflicts with the privacy provisions of the Gramm Leach Bliley Act, 15 U.S.C. § 6801,

et seq. (the "Act"). The Act prohibits insurance companies "directly or through any affiliate" from disclosing "nonpublic personal" information.[10] Although there is an exception that permits disclosure to state regulatory authorities (15 U.S.C. § 6802(e)), the Act prohibits the state regulatory authority from disclosing that information to third-parties. 15 U.S.C. § 6902. The Act provides that

> a nonaffiliated third party [such as the Commissioner] that receives from a financial institution nonpublic personal information . . . shall not disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6902(c). In the instant matter, the HVIRA requires that the Commissioner publish private information on a public registry. CAL. INS. CODE § 13803. Such disclosure would simply not be compatible with the requirements of the Act.

The HVIRA's attempt to expand California's regulatory authority beyond its borders is wholly inconsistent with the limitations imposed by the Commerce Clause. If allowed to stand, the HVIRA would create regulatory chaos. Particularly in an industry as highly regulated as insurance, it is crucial that the boundaries of authority of individual state regulators are clear. The Commerce Clause prohibits California from dictating conduct in other states and other nations.

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10. Nonpublic information is defined as personally identifiable information provided by a consumer to a financial institution, resulting from any transaction with the consumer or any services performed for the consumer, or otherwise obtained by the financial institution. 15 U.S.C. § 6009(4)(A).

III. THE HVIRA VIOLATES THE FOREIGN AFFAIRS POWER

A. The HVIRA Violates The Foreign Affairs Power Under *Zschernig*

The Commissioner defends the HVIRA as "a reporting statute" that applies only to "insurers doing business in California." Resp. Brf. at 6. As such, he argues that the HVIRA "does not raise the diplomatic concerns evident in *Zschernig*." *Id.* at 22. Furthermore, he claims that "the HVIRA does not criticize any foreign government." *Id.* at 25.

The Commissioner's claimed justification for the statute is to "protect[] California against insurance companies that . . . *might be* influenced by companies that are engaging in the widespread practice of wrongfully withholding insurance information from insureds and beneficiaries." Resp. Br. at 1. The Commissioner goes on to suggest that he has a better understanding of German law than does the German government. *Id.* at 22, n.10.

These justifications conflict sharply with the Commissioner's defenses of the statute contained in his brief. They reflect California's apparent dissatisfaction with "substantial diplomatic" efforts conducted by the United States and Germany since the end of World War II to achieve "expeditious disposition" of Holocaust insurance claims, which includes over $100 billion paid by the Federal Republic of Germany. Brief of the United States as *Amicus Curiae* (dated Feb. 2003) at 1-2; Feb. 24, 2003 *Amicus* brf. of FRG at 2. They reflect California's criticism of European (and specifically German) data protection laws that prohibit the unauthorized disclosure of personal information as required by the HVIRA. Feb. 24, 2003 *Amicus* brf. of FRG at 3-4.

The HVIRA is an attempt by the State of California to impose its own "solution" to Holocaust-era claims despite the Federal Republic of Germany's 55 years of reparations efforts and the July 17, 2000 Executive Agreement. *See* CAL. INS. CODE § 13801(e)-(f); Reply App. at 1a-5a. The HVIRA, which invariably focuses on Germany, is a clear and unmistakable criticism of German domestic law on such issues as data protection, currency valuation, insurance regulation and Holocaust reparations and compensation. In the view of the German government, "reversal of [the Ninth Circuit decisions] are necessary to enjoin the State of California's intrusion on German sovereignty and its impermissible interference with the U.S.-German Executive Agreement and the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity." Feb. 24, 2003, *Amicus* brf. of FRG at 13.

As reflected by the *amicus* filings of the United States, Germany and Switzerland, the HVIRA constitutes impermissible interference with the federal government's conduct of foreign affairs. *Zschernig v. Miller*, 389 U.S. 429 (1968).

B. The HVIRA Interferes With The Implementation Of The Executive Agreement

The Executive Agreement entered into by the United States and the Federal Republic of Germany was the culmination of 55 years of diplomatic efforts to resolve claims arising out of the Holocaust. The Executive Agreement resulted in the establishment of the Foundation, "Remembrance, Responsibility and the Future" ("Foundation"). It also provided for the resolution of Holocaust-era insurance claims through the "current claims handling procedures adopted by [ICHEIC]." ER 822.

On October 16, 2002, the Foundation, ICHEIC, and the German Insurance Association ("GDV") entered into the

Agreement Concerning Holocaust-era Insurance Claims (the "Agreement"). Lodg., L-70-L-89. The Agreement established claims handling procedures, valuation techniques, and created a mechanism by which the entire German insurance market would participate in the publication of relevant policyholder information. Those efforts will soon permit Holocaust victims and their heirs to "have access to the most comprehensive listing ever available of insurance policies issued to Jewish residents of Germany during the Nazi era" in a manner that does not offend Germany data protection laws.[11] The GDV was able to accomplish this breakthrough because of the promise of legal peace for German insurers contained in the Agreement. Lodg., L-147-L-151.

At the time of the signing of the Agreement, the Foundation distributed approximately $100 million to ICHEIC for payment of valid Holocaust-era insurance claims against German companies. An additional $175 million was made available to ICHEIC for humanitarian purposes. *www.icheic.org/eng/German_foundation_Agreement_Press_Advisory.pdf.*

The Agreement has received wide support, including from U.S. insurance regulators and the National Association of Insurance Commissioners ("NAIC").[12] "All parties worked hard to produce a fair agreement, which conforms to the principles the NAIC has insisted upon." *Id.* The chair of the NAIC International Holocaust Commission Task Force identified the following significant benefit afforded by the Agreement: "[b]y bringing the entire German market into this process along with the original ICHEIC companies, we've greatly expanded

11. Statement by Ambassador Randolph M. Bell to U.S. House of Representatives, Sept. 24, 2002. Lodg., L-65-L-68. *See, www.house.gov/reform/min/pdfs/pdf_com/pdf_holocaust_hearing_sept_24_bell_testimony.pdf.*

12. *See, www.naic.org/pressroom/releases/re1020902_ICHEIC_Agreement.htm.*

survivors' opportunities to see valid claims paid." *Id.* This far exceeds any imagined benefit offered by oppressive legislation such as the HVIRA (which, by its terms, only reaches European companies which are "related" to California insurers).[13]

Significantly, on December 2, 2002, Germany's federal insurance regulatory authority *(Bundesanstalt für Finanzdienstleistungsaufsicht* or *"BaFin")* issued a directive to all German life insurers requiring production of all electronically maintained policyholder lists for the period 1920 to 1945. Reply Lodging at L-4-L-12.[14] As a result, a list of approximately nine million German policyholder names from the period 1920 to 1945 has been assembled. Reply Lodging at L-2. Under the terms of the Agreement, this list is being compared with pre-War census data to create a single consolidated list of Jewish policyholders in Germany from the period at issue. On April 8, 2003, the Foundation reported: "[t]his process will be completed soon. As foreseen in our Agreement the matching result will be published on the Internet. This will

13. The arguments contained in the NAIC *amicus curiae* brief filed in support of affirmance in this matter ring particularly hollow given that organization's enthusiastic support of the Agreement and its self-proclaimed role in the establishment of ICHEIC. Brief of the National Association of Insurance Commissioners as Amicus Curiae in support of Respondent (March 2003). In the one hand, the NAIC (acting through ICHEIC) has agreed to the processes set forth in the Agreement. On the other hand, the NAIC urges this Court to affirm the constitutionality of the HVIRA. When entering into the Agreement, ICHEIC and its members (including the NAIC and the Commissioner) agreed to use their "best efforts to achieve an all embracing and enduring legal, regulatory, legislative and administrative peace for German insurance companies which are in compliance with this Agreement." Lodg. at L-83. The HVIRA clearly does not afford the bargained-for peace which is required by the Agreement.

14. References to "Reply Lodging" are to the documents contained in the Lodging filed concurrently with the Reply Brief for the Gerling Companies.

enhance the world-wide public awareness of our process considerably without violating European and German data protection laws." Reply Lodging at L-2.

More recently, by letter dated April 11, 2003, the President of BaFin informed ICHEIC Chairman Lawrence Eagleburger that compilation of this policyholder list has been completed. Reply Lodging at L-13. "The process of reconciling it with the 'Residents List' can now begin." *Id.*

The procedures embodied in the Agreement evidence the very reason why matters of foreign policy are entrusted to the federal government and not the individual states. The diplomatic efforts of the federal government have resulted in the imminent publication of a Holocaust-era policyholder list far more comprehensive than anything California could hope to achieve through the HVIRA. This has been accomplished in a manner consistent with internal European laws. This has been accomplished with the active assistance of legitimate regulatory authorities (not through the projection of California's regulations into Europe). This has also been accomplished without threatening the licenses of domestic insurers which collectively underwrite in excess of twenty percent (20%) of all property and casualty insurance policies in the State of California.[15]

The HVIRA has more than an "incidental or indirect effect in foreign countries" and poses "great potential for disruption or embarrassment" of U.S. foreign policy. As such, it impairs the federal government's foreign affairs power.

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15. *See* 2001 California Preliminary P&C Market Share Report located at the California Department of Insurance Website at *http://www.insurance.ca.gov/RRD/RSU/mktshr2001/mktshr2001.htm.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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